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IN THE

Supreme Court of the United States

October Term, 1962

No. 700

HARBOR CARRIERS OF THE PORT OF NEW YORK AND ITS MEMBERS,

v.

NATIONAL LABOR RELATIONS BOARD.

GALLAGHER BROS. SAND & GRAVEL CORP., BILKAY HOLDING CORP., HAMPTON SCOWS, INC., NEPTUNE LINE, INC. and ROCKVILLE SCOWS, INC.,

v.

NATIONAL LABOR RELATIONS BOARD.

NATIONAL LABOR RELATIONS BOARD,

v.

CHARLES J. KING and DECK SCOW CAPTAINS LOCAL 335, UNITED MARINE DIVISION, NATIONAL MARITIME UNION, AFL-CIO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS, HARBOR CARRIERS OF THE PORT OF NEW YORK AND ITS MEMBERS, IN OPPOSITION

ROMAN BECK,
Counsel for Respondents, Harbor Carriers of the Port of New York and its Members,
Office & P. O. Address,
27 William Street,
New York 5, N. Y.

ARTHUR KARGER,
JACOB I. GOODSTEIN,
MAURICE A. KRISEL,
CHRISTOPHER E. HECKMAN,
CHARLES J. CARROLL, JR.,
of Counsel.

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BRIEF FOR RESPONDENTS, HARBOR CARRIERS OF THE PORT OF NEW YORK AND ITS MEMBERS, IN OPPOSITION *

Opinions Below

The opinions of the court below (App. B of Pet.) are reported at 306 F. 2d 89. The findings of fact, conclusions

* This brief in opposition is also submitted on behalf of the following members of Harbor Carriers of the Port of New York, which filed their separate petition for review of the Board's order in the court below: Gallagher Bros. Sand & Gravel Corp., Bilkay Holding Corp., Hampton Scows, Inc., Neptune Line, Inc. and Rockville Scows, Inc.

of law and order of the National Labor Relations Board (herein "the Board") (Record, Vol. III, pp. 5a-77a) are reported at 136 NLRB No. 79. The orders of the court below denying the petition for rehearing (App. B of Pet., pp. 40-41) are not reported.*

Jurisdiction

The Board itself has not challenged the decree of the court below, either by petition to that court for rehearing or by petition to this court for a writ of certiorari. That has been done only by the petitioning union herein, which was the charging party before the Board and which has sought to invoke this Court's jurisdiction under 28 U. S. C., Section 1254(1). Respondent employers challenge the standing of that union to petition for certiorari.

Statutes Involved

In addition to the statutes set forth in Appendix A to the petition here (pp. 21-24), another statutory provision involved herein is Section 603(b) of the Labor Management Reporting and Disclosure Act of 1959 (73 Stat. 540, 29 U. S. C., § 523(b)), which is set forth in Appendix A of this brief.

Questions Presented

1. Whether the charging party before the Board, which was merely granted leave by the court below to submit a brief and argue in support of the Board's position in seek-

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* The Board adopted the findings, conclusions and recommendations of its Trial Examiner in their entirety. The Examiner's findings are accordingly referred to in this brief interchangeably as those of the Board as well as of the Examiner. The symbols "App. B. of Pet." refer to Appendix B of the petition for certiorari herein. Figures in parentheses preceded by the symbols "H.C. App." refer to the pages of the Appendix to the brief of respondents, Harbor Carriers in the court below (Record, Vol. III). Figures in parentheses preceded by the letter "T." refer to the pages of the stenographic transcript of the testimony taken before the Examiner.

ing to enforce its order, has standing to petition this Court for certiorari to review the decree of the court below denying enforcement of that order, when the Board itself has not petitioned for certiorari.

2. Whether the court below "misapprehended" or "grossly misapplied" the controlling standards of judicial review laid down by this Court in *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 488, 491.

3. Whether the question attempted to be raised by the petitioner, as to the alleged invalidity of the parent union's appointment of a "trustee" for the local union to which the petitioning union claims to be the successor in interest, is properly before this Court, when the Board itself, whose order the petitioning union is here seeking to enforce, held that that question was irrelevant to the issues presented.

Statement

The respondent-employers comprise the members of an association known as Harbor Carriers of the Port of New York, and certain individual employers, who own and operate deck scows in the New York Harbor area. For many years, the employers had collective bargaining agreements with a local union representing the employees working on such scows, who are known as scow captains. That local union is affiliated with the United Marine Division of the National Maritime Union, AFL-CIO, and is known as Deck Scow Captains Local 335, UMD, NMU, AFL-CIO (herein "Local 335, UMD"). The agreements in effect during the period involved herein were for the term from May 1, 1959 to March 31, 1961 (H.C. App. 18a-19a).

Because of the peculiar nature of the industry, as found by the Board, it was either impossible or extremely difficult for all or substantially all of the scow captains to attend a meeting of the local on any one day (H.C. App. 33a-35a). The local's constitution thus provided that on such important matters as the election of officers and the adoption of amendments to the constitution, there was to be balloting over a period of approximately fifteen days (G.C., Exh. 2N, Arts. IX and XIV; H.C. App. 34a).

At a membership meeting of Local 335, UMD held on April 3, 1960, attended by about 100 members (T. 1066), a motion was adopted to hold a mail referendum among the local's membership under the auspices of the Honest Ballot Association, on whether Local 335, UMD should merge with its sister Local 333, UMD, which represented the men employed on the tugs used to tow the deck scows (H.C. App. 20a). In spite of that mandate, however, at a later meeting on April 18, 1960, attended by only 27 men (T. 136-8; H.C. App. 78a), the motion to hold the referendum on the proposed merger was rescinded (H.C. App. 20a).

At a subsequent membership meeting held on May 15, 1960, the resignation of Hugo Kasten, who had for many years been the local's secretary-treasurer, was accepted, and Thomas M. Wilhelm was elected secretary-treasurer for the balance of Kasten's term (H.C. App. 20a-21a). Kasten's election did not comply with the fifteen-day balloting requirements of the local's constitution. At the same meeting, a motion was adopted to hold a special meeting on May 29 to vote on the question of the local's disaffiliation from the UMD and the NMU (H.C. App. 21a).

A number of other changes in the local's leadership occurred during the few weeks preceding the meeting of May 29. The local's president and vice-president and one of its trustees resigned, and the executive board decided not to fill those vacancies until the next regular election in October (H.C. App. 23a). Since there was another inactive trustee, who had been confined to the hospital for many years, the result was that the local was left with an executive board of less than the five members requisite under the local's constitution to constitute a quorum (H.C. App. 80a-81a).

In addition to the secretary-treasurer, the only paid personnel of the local were David Graham, its delegate, and Thomas Anglim, who maintained the local's records, ran its hiring hall, and collected dues (T. 100-101, 719). On May 17, Wilhelm discharged Anglim (H.C. App. 21a). On May 20, the UMD appointed Anglim as temporary administrator for the local and wrote to the employers advising

them to deal with the administrator on all matters concerning the collective agreements (H.C. App. 21a-22a).

The special membership meeting of May 29 was attended by approximately 20% of the membership—*i.e.*, by 138 to 154 members in good standing out of a total membership of between 700 and 750 (H.C. App. 35a). The Board itself found that a substantial number of the local's members were unable to attend the May 29 meeting and that "Because of the nature of the industry * * * a genuine opportunity to vote could have been accorded only by a means of mail ballot, or balloting spread out over a reasonable period of time" (H.C. App. 35a, fn. 35). A resolution was nevertheless submitted at that meeting, and was adopted by a vote of from 130 to 140 in favor, and 8 to 14 opposed, to effect an immediate disaffiliation from the UMD and the formation of a new local, to which the existing contracts and the assets and records of the original local were to be transferred, and which was to seek a new affiliation with an international union (H.C. App. 24a).

Both the new local thus formed—Deck Scow Captains Local 335, Independent (herein called "Independent")—and the original contracting union—Local 335 UMD, acting through its administrator—then made conflicting demands upon the employers, each claiming to be entitled to administer the existing contracts as the contracting local. The employers decided that they would abide by all the substantive provisions of the contract, but to protect their employees from pressures which they feared both factions would exert, they would refrain in hiring scow captains from calling upon either union's hiring hall (H.C. App. 25a). The Board found no violation of the Act in this conduct (H.C. App. 63a). The Board found further that because of its contract bar rule a Board-conducted election was not available to the employers for the resolution of their dilemma during the term of the existing contracts with Local 335, UMD (H.C. App. 32a). Under the circumstances, the employers declined Independent's requests for a meeting and advised that local that their contract was with Local 335, UMD, and that they recognized that contract (H.C. App. 26a).

On June 19, 1960, Independent, led by Wilhelm, called a meeting attended by some 165 men, at which a resolution was adopted in favor of becoming a chartered local of the Seafarers International Union (herein "S.I.U.") (H.C. App. 28a). The new local thereupon operated as an affiliate of the S.I.U. until the S.I.U. charter was withdrawn in September 1960.

As respects the crucial disaffiliation action taken at the meeting of May 29th, on the basis of which Independent was formed, the Board adopted the following finding made by the Examiner (H.C. App. 35a):

> "Taking into consideration the peculiar nature of the industry, as described above, and the facts as to the meeting of May 29, in particular, I conclude that the vote there taken was not, standing alone, fairly representative of the wishes of the majority of the local's members, a substantial portion of whom were in effect disenfranchised."

The same considerations were equally applicable to the vote at the meeting of June 19th to accept a charter from the S.I.U., and the Board placed no operative significance on that meeting.

The Board held, however, that the abortive disaffiliation action of May 29th was thereafter ratified by a majority of the members when "approximately 500 deck scow captains out of a total of about 750 signed cards accepting the affiliation of Local 335, Independent, with the S.I.U. and an approximately equal number signed up for strike duty in July" (H.C. App. 36a).

No claim of ratification was advanced by the Board's general counsel either in the complaint or at the hearing before the Examiner. Neither the S.I.U. cards nor the list of those who had signed up for strike duty was produced at the hearing, and the employers' request for production of the latter list was denied by the Examiner (H.C. App. 86a-87a). The evidence on this subject consisted only of the unsubstantiated testimony of Wilhelm and of Nappo, the strike chairman.

The record does not reveal the exact nature or contents of the S.I.U. cards referred to by the Examiner, or the exact time or times when, or the circumstances under which, they were signed. Wilhelm's testimony was simply that "we had 500 cards that they signed to accept and stay in the S.I.U." (H.C. App. 79a). The supposed cards were in no way further identified, and Wilhelm testified that no new membership cards were issued (H.C. App. 79a). As regards the time of signing, all that the record showed was that the cards were signed at various times between the issuance of the S.I.U. charter in June 1960 and its withdrawal in September 1960 (H.C. App. 79a). Nappo's testimony with regard to the signing up for picket duty was simply that between July 18 and July 24 or 25, 1960, he signed up "close to 500 people for picket duty" (H.C. App. 84a-86a).

The gravamen of the Board's complaint was the employers' refusal to deal with Independent. (Nat. Lab. Rel. Act, § 8(a)(5); 29 U. S. C. § 158(a)(5).) The Board's decision was predicated solely on its finding that Independent was from and after May 29, 1960 "the *alter ego* or continuance" of the original contracting local (H.C. App. 37a-38a). The other charges sustained by the Board related to the conduct of two of the employers in having yielded to the demand of Local 335, UMD for the enforcement of the union security clause in the contracts by the lay-off for a brief period of three employees (H.C. App. 65a-66a). Those charges were all predicated on the primary charge of the employers' refusal to bargain with Independent.

The strike to which the Board made reference was called against two of the 29 employers, and lasted from July 20 to July 25, 1960 (H.C. App. 28a-29a).

By an offer of proof which the Board rejected as immaterial (H.C. App. 87a-93a), the employers attempted to show that when the strike began, officials of the NMU and the S.I.U. intervened in order to resolve the dispute over

recognition; that an agreement was reached on behalf of both competing unions that the strike should be terminated and all the employees should return to work without discrimination and that the question of recognition should be submitted for final disposition to AFL-CIO president George Meany. The strike settlement was carried out and the men went back to work. President Meany thereafter decided that the secession of the Wilhelm group, followed so quickly by the issuance of the S.I.U. charter, was a breach by the S.I.U. of the "no-raiding" provisions of the AFL-CIO constitution, and he accordingly ordered the S.I.U. charter to be withdrawn. The S.I.U. complied and withdrew the charter in September 1960 (H.C. App. 29a), but the Wilhelm group did not return to Local 335 UMD, as the Meany decision contemplated.

ARGUMENT

I

Independent Has No Standing to Invoke the Jurisdiction of This Court

The Board did not seek rehearing in the court below and has not seen fit to petition this Court for certiorari, though its time to do so has long since elapsed. Independent, the petitioner herein, has never been a party to these proceedings and has no standing to invoke this Court's jurisdiction. While Independent moved in the court below for leave to intervene as a party in the proceedings, that motion was opposed by the Board itself, which suggested that Independent be granted merely leave to file a brief as *amicus curiae*. The court below, by order dated May 21, 1962, did not grant Independent leave to intervene, but merely gave it permission to file a brief, with leave to ask the court on the argument of the appeal for permission to argue. (See Motion to Intervene, Affidavit in Opposition, and Order of Court of Appeals, dated May 21, 1962, submitted by petitioner as part of the record herein.)

Apart from petitioner's lack of status as a "party" (28 U. S. C. § 1254(1)), it is in any event without standing to seek review by this Court for the purpose of securing enforcement of the Board's order. It is thus settled that under the scheme of the National Labor Relations Act, the Board alone—as distinguished from "any private person or group * * * or any employee or group of employees"—"is authorized to take proceedings to enforce" its order. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265-6.

In *Amalgamated Utility Workers, supra*, the union which had been the charging party before the Board, was permitted to intervene before the Court of Appeals in the Board's proceedings to enforce its order. That union was also heard in this Court in the certiorari proceedings for review of the Court of Appeals' decree of enforcement. Following this Court's modification of that decree, the union initiated a proceeding before the Court of Appeals to have the employers adjudged in contempt for failure to comply with the decree. The Board, though not a moving party, asserted its willingness to participate in an investigation to ascertain whether the decree had been violated. The Court of Appeals denied the union's application on the ground that it had no standing to press a charge of civil contempt. This Court unanimously affirmed that determination, in an opinion by the late Chief Justice Hughes.

On the basis of a careful analysis of the Act, Justice Hughes concluded that the Board alone was vested with exclusive authority, not only to initiate and prosecute the administrative proceedings culminating in its order, but also to initiate and prosecute any proceedings for judicial enforcement of that order or for punishment of violations of the judicial decree of enforcement. He thus stated (309 U. S. at 270):

> "As the court has no jurisdiction to enforce the order at the suit of any private person or group of persons, we think it is clear that the court cannot entertain a petition for violation of its decree of enforcement save as the Board presents it."

Justice Hughes observed that "The Board seeks enforcement as a public agent, not to give effect to a 'private administrative remedy'" (p. 269).

Justice Hughes emphasized that the remedy afforded by section 10(f) of the Act to a person aggrieved by the Board's order was simply "an opportunity afforded to *contest* a final order of the Board, not to *enforce* it" (p. 266). The "proceeding under § 10 (f)", he noted, "seeks not to require compliance with the Board's order but to overturn it" (p. 266).

While this Court has held that its certiorari jurisdiction may be invoked by a union which had been granted leave by the court below to intervene in support of proceedings initiated by the Board to secure a modification of its order as judicially enforced (*International Union* v. *Eagle-Picher Co.*, 325 U. S. 335, 338-9), that decision is merely an application of Justice Hughes' differentiation between the contesting and the enforcement of Board orders. The proceedings for modification in *International Union*, *supra*, thus actually sought to *contest* and *overturn* a portion of the Board's order (cf. the Court's citation in support of its ruling, 325 U. S. at 339, fn. 7, of *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 218, a case involving the *contesting* of a Board order). Where, on the other hand, as here, the petitioning union's purpose in invoking this Court's jurisdiction is to secure *enforcement* of the Board's order, it is clear that it has no standing therefor. See *International Union* v. *Eagle-Picher Co.*, *supra*, 325 U. S. at 338-9, fn. 6, reaffirming the principle of *Amalgamated Utility Workers*.

The principle of *Amalgamated Utility Workers* applies with even greater force in the case at bar, since, as noted above, the petitioning union herein has never been a party to these proceedings, through intervention or otherwise. The order of the court below, on which petitioner apparently relies for its status, was nothing more than the equivalent of an order permitting it to express its views as *amicus*

curiae (*cf.* Rules of U. S. Supreme Court, Rules 42, 44 [subd. 7]; *Halesion Drug Stores, Inc.* v. *N. L. R. B.*, 190 F. 2d 1022 (9th Cir.)).

There is thus a strong current of authori ..at leave to intervene may not be granted to a private person or group, such as the charging party, before the Board, for the purpose of supporting the Board's petition for enforcement of its order. (*Amalgamated Meat Cutters* v. *N. L. R. B.*, 267 F. 2d 169 (1st Cir.), cert. den., 361 U. S. 863; *Halesion Drug Stores, Inc.* v. *N. L. R. B.*, *supra*, 190 F. 2d 1022 (9th Cir.); *Stewart Die Casting Corp.* v. *N. L. R. B.*, 132 F. 2d 801, 804 (7th Cir.); *Aluminum Ore Co.* v. *N. L. R. B.*, 131 F. 2d 485, 488 (7th Cir.).) Furthermore, the lack of standing of the private person or group is of a jurisdictional nature (see *Amalgamated Utility Workers*, *supra*, 309 U. S. at 270), and it has been held that intervention may not be granted even with the parties' consent (*Amalgamated Meat Cutters* v. *N. L. R. B.*, *supra*; *Halesion Drug Stores, Inc.* v. *N. L. R. B.*, *supra*).

Indeed, even if an order of intervention had been granted to Independent by the court below, it would have been no more effectual than the order of intervention in *Amalgamated Utility Workers*, *supra* (*cf.* 309 U. S. at 263). For under the doctrine of that case, the intervening union would not have possessed the "independent right to relief" requisite for appellate review (*cf. Boston Tow Boat Co.* v. *United States*, 321 U. S. 632, 634; *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 283).

II

The Court of Appeals Correctly Applied the Controlling Standards of Judicial Review in Setting Aside the Board's Order

This case does not present any important, general or novel question of law warranting review by this Court. The primary (and first) question posed by petitioner is nothing more than whether the Court of Appeals "misappre-

hended'' or ''grossly misapplied'' the controlling standards of judicial review (*Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 491; *Labor Board* v. *Walton Mfg. Co.*, 369 U. S. 404, 408). It is clear that that court scrupulously respected those standards, and that it was fully warranted in holding that the Board's decision lacked the support of substantial evidence under the criteria laid down by this Court in *Universal Camera Corp., supra.*

The crucial question, in the Board's own view, was whether Independent was merely a continuation of Local 335, UMD under a new name. ''The focal point is the vote at the meeting of May 29 together with subsequent 'ratification' '' (Opinion of Hays, C. J., App. B of Pet., p. 31). Under the Board's own findings, as noted above, the May 29th vote was not of itself effectual as action of the contracting union, binding on the union or its membership, since it ''was not, standing alone, fairly representative of the wishes of the majority of the local's members, a substantial portion of whom were in effect disenfranchised'' (H.C. App. 35a). The disaffiliation vote was thus nothing more than the expression of the wishes of a small faction, comprising less than 20% of the total membership, and the position of the newly formed Independent was consequently nothing more than that of a new rival organization. Cf. *Kearney & Trecker Corp.* v. *N. L. R. B.*, 210 F. 2d 852, 856 (7th Cir.), cert. den., 348 U. S. 824.

''Keeping in mind that the issue is not whether a substantial part of the membership wished to withdraw from the Local and form a new organization, but whether the old organization merely changed its name and affiliation, what is to be said of the subsequent 'ratification' of this disaffiliation vote?'' (Opinion of Hays, C. J., App. B of Pet., p. 32.)

In the Board's own view, the disaffiliation vote could not be regarded as valid action of the local union binding upon its entire membership, unless it represented the free and deliberate choice of the majority of its members expressed at a meeting held on due notice at which ''the employees

involved have had an opportunity to exercise their judgment on the merits of the conflict" (see *Hershey Chocolate Corp.*, 121 N. L. R. B. 901; H.C. App. 35a). Any claimed ratification by a majority would necessarily have to satisfy the same requisites.

The only evidence before the Board relating to the alleged "ratification" was that over a period of anywhere from one to four months after the disaffiliation vote a majority of the employees had individually signed cards of undisclosed form and content, apparently signifying their acceptance of the affiliation with the S.I.U., and that some two months after the disaffiliation vote they had individually indicated their willingness to support the strike called by the S.I.U. local. There was no showing whatever, however, that in being asked to sign the S.I.U. cards or to sign up for picket duty, the individual members were accorded the full and free "opportunity to exercise their judgment" as to whether or not to disaffiliate from the UMD. On the contrary, the evidence is undisputed that the employees were given no choice whatever in that regard, and that certainly they did not have a free choice.

The disaffiliation was then represented by the Wilhelm faction to be a *fait accompli*, and beyond recall; that faction had indeed started functioning as an unaffiliated local union immediately after the May 29th disaffiliation vote, and by letters to the employers (on May 29th and June 2nd and 10th) as well as to the union membership (on June 3rd and 10th) had asserted the position that the disaffiliation was an accomplished fact (G.C. Exh.'s 2D2, 2E1, 2F, 7, 8; H.C. App. 24a-26a, 27a-28a). The only choice offered to the individual members was at most that of accepting or not accepting the *S.I.U. charter*. As the court below noted, "For all that appears a large number of the signers may have preferred not to disaffiliate from the United Marine Division, but, if such disaffiliation was inevitable, then and only then to affiliate with the Seafarer's" (App. B of Pet., p. 33).

The mere fact that a majority of the employees signified their support for the new organization certainly would not establish that that organization was a continuation of the original local. As the court below pointed out (App. B of Pet., pp. 28-29), unless the Board could rationally conclude that Independent was a continuation of the original contracting union, the employers concededly could not lawfully have dealt with it even if Local 335, UMD were repudiated by a majority of the employees. This results from the Board's contract-bar doctrine, which requires an employer to continue to deal with a contracting union for the balance of the term of the contract even if a majority of the employees transfer their support to another union, unless and until such other union is certified at a Board-conducted election. (*N. L. R. B.* v. *Marcus Trucking Co.*, 286 F. 2d 583, 593 (2d Cir.); *Montgomery Ward & Co., Inc.*, 121 N. L. R. B. 188; *Dick Brothers, Inc.*, 107 N. L. R. B. No. 219; *B & B Beer Distributing Co., Inc.*, 124 N. L. R. B. No. 185; *cf. Brooks* v. *N. L. R. B.*, 348 U. S. 96).

The Board indicated no intent to depart from its contract bar rule in this case. On the contrary, it affirmed the Examiner's finding that the contract bar rule was here applicable (H.C. App. 32a, 40a). The Board further made it clear that its decision was predicated solely on its finding that Independent was the "*alter ego* or continuance" of the contracting local (H.C. App. 37a-38a), and it is on that basis that the Board's order is reviewable (*Securities and Exchange Comm.* v. *Chenery Corp.*, 318 U. S. 80, 87; *N. L. R. B.* v. *Lundy Manufacturing Corporation*, 286 F. 2d 424, 426 (2d Cir.)).

In any event, it is clear that no effect can be given to the asserted fact of majority support, whether on the theory of ratification or otherwise, since the Wilhelm group solicited and obtained any such support from May 29, 1960 onwards under "a deceptive cloak of authority" as the purported continuation of the original contracting local, with the exclusive right to administer the existing contracts, including the union security clause. *Cf. Garment Workers*

v. *Labor Board*, 366 U. S. 731, 736, 737; *Kearney & Trecker Corp.* v. *N. L. R. B.*, *supra*, 210 F. 2d 852, 857-8. Confronted by these pretensions, the individual employee could certainly not be regarded as having exercised a free and deliberate choice (*cf. Garment Workers* v. *Labor Board*, *supra*, 366 U. S. at 736).

Furthermore, in view of the "safeguards to voluntary choice" affecting disaffiliation action, which the Board itself has insisted upon, it is manifest that any subsequent ratification of abortive disaffiliation action "should occur by a procedure no less solemn" (*cf. Brooks N. L. R. B.*, *supra*, 348 U. S. 96, 99). The Board has thus insisted that any disaffiliation action must be accomplished "by formal group action" taken at a duly held representative meeting of the local. *Charles Beck Machine Corporation*, 107 N. L. R. B. 874; *Hershey Chocolate Corp.*, *supra*, 121 N. L. R. B. 901; *Dick Brothers, Inc.*, *supra*, 107 N. L. R. B. No. 219. It is clear that "ratification" of otherwise ineffectual disaffiliation action through the medium of approaches to individual members, as in the present case, cannot be accepted as a substitute for collective action taken at a properly held meeting. The sanctioning of such approaches would undermine the basic policies underlying the Act, as declared by the Board itself, by facilitating raids, subverting contract stability and enabling a dissident faction to seize control of a local union and thereafter gain majority support under a deceptive cloak of authority. The Board has thus emphasized that it "will not permit the 'schism' doctrine to be used to facilitate raiding by a rival union". See *Roberts Brass Mfg. Co.*, 114 N. L. R. B. No. 18; *Hershey Chocolate Corp.*, *supra*, 121 N. L. R. B. 901; *Dick Brothers, Inc.*, *supra*, 107 N. L. R. B. No. 219.

Further militating against the premise that the alleged acts of "ratification" reflected the free and untrammeled choice of the membership, is the significant circumstance that when the cards were signed and the signing up for picket duty occurred, the local which the men were asked to support was already under the aegis of a rival interna-

tional, the Seafarers. The Seafarers, in addition, made available their Hall for the holding of the strike meeting of July 17, as well as for the signing up of members for picket duty, and apparently also for the signing of the S.I.U. cards; and a representative of the Seafarers addressed the strike meeting (T. 771-2, 779, 194; H.C. App. 84a-85a, 79a).

The Board itself has thus declined to regard as action of the contracting union, a purported disaffiliation vote of the membership which takes place at the meeting hall of a rival organization and which is assisted by the rival organization. See *Dick Brothers, Inc., supra*, 107 N. L. R. B. No. 219; see also *Roberts Brass Mfg. Co., supra*, 114 N. L. R. B. No. 18.

The mere facts, stressed by the Examiner, that the new local took possession of the assets and records of the contracting local, and that four of the eight members of the contracting local's executive board purported to continue as officers of the new local (H.C. App. 36a), were in no way probative of the continuance of the original organization in the new (see opinion of Hays, C. J., App. B of Pet., p. 34). Indeed, the Examiner adverted to that evidence only after having first reached the conclusion that the May 29 disaffiliation action was retroactively validated by the alleged acts of "ratification" (H.C. App. 36a).

Obviously, neither the Examiner nor the Board intended to hold that a non-representative faction in a local, led by a few officers, could form a new local union and transfer thereto the contracts, assets and records of the old local, without formal group action representative of the wishes of a majority of the membership. The decisions of the Board itself as well as of the courts make it clear that the mere fact that the new local in such a case may have the "accoutrements" of the old local, including the officers, assets and records, cannot operate to vest the new local with the identity of the original contracting union. *Hershey Chocolate Corp., supra*, 121 N. L. R. B. 901 (where the

Board emphasized that the officers transferring their allegiance to the new local "may or may not reflect the employees' wishes"); *Dick Brothers, Inc., supra*, 107 N. L. R. B. No. 219 (where all the officers and committeemen of the old local continued on in the same positions in the new local); *Kearney & Trecker Corp. v. N. L. R. B., supra*, 210 F. 2d 852, 856, 857; *M and M Wood Working Co. v. N. L. R. B.*, 101 F. 2d 938, 941 (9th Cir.).

As the court below pointed out, the original contracting local did not disappear or become defunct, but continued to function actively, claiming to be the rightful holder of the contracts and administering such contracts to the extent it was permitted to do so (App. B of Pet., pp. 34-5). Nor did the Board make any finding that the original contracting local was defunct. On the contrary, it made a finding that the appointment of Anglim as temporary administrator did *not* render the local defunct (H.C. App. 31a-32a). And since the new local formed following the May 29 vote, did not acquire the status of the contracting local, even under the Board's own findings, at least until the subsequent purported acts of ratification some two or more months later, the UMD local obviously continued in being as the original contracting organization.

The Examiner's conclusion that the UMD local became "basically a different organization" (than the contracting local) from and after May 29 (H.C. App. 38a), was therefore unsupportable on its face, since it was in direct conflict with those findings. The mere fact, on which the Examiner relied, that Local 335, UMD after May 29 solicited the scow captains to sign new membership cards (H.C. App. 37a) in no way supported the Examiner's conclusion. Since Wilhelm had taken possession of all of the old cards, Local 335, UMD was of necessity obliged to use new cards. The emphasis thus placed on the new cards is, moreover, inconsistent with the Examiner's reliance on the local's securing the signature of some 500 members to new S.I.U. cards (H.C. App. 36a). The Examiner's reliance on the circulation of a "new constitution", is similarly misplaced since

there is no showing that the document in question was anything more than a "*proposed* new constitution" or that it was ever adopted (H.C. App. 37a).

The Examiner's conclusion that it was Local 335, UMD, rather than Independent, that resorted to "raiding" tactics (H.C. App. 37a), was predicated on his finding that the "ratification" of the May 29 disaffiliation action operated to vest Independent with the status of the original contracting local. Since, however, as noted above, that finding is unsupportable and cannot stand, the conclusion with regard to "raiding" likewise necessarily falls.

In short, the situation here presented was a fairly typical example of the secession of part of the membership to form a new organization. As the court below correctly held, there was no substantial evidence to support a finding that this new organization was merely the "*alter ego* or continuance" of the original union. Obviously, the employers could not be required to bargain with this new rival union unless and until its majority status was established at a Board-conducted election.

III

The Contention as to the Alleged Invalidity of the Appointment of the Administrator of the Contracting Local Has No Relevance to This Case and Is Not a Question Presented by the Record Herein

Petitioner's purported second question—as to the effect of a parent union's appointment of a trustee for a subsidiary local in the absence of express provision therefor in the parent union's constitution or by-laws—is simply not presented by this record. The very contention here urged by petitioner was rejected by the Board as "immaterial to the issues" (H.C. App. 31a), and it is settled that the Board's order is reviewable only upon "the grounds • • • upon which the record discloses that its action was based"

(*Securities and Exchange Comm. v. Chenery Corp., supra*, 318 U. S. 80, 87; *N. L. R. B. v. Laddy Manufacturing Corporation, supra*, 286 F. 2d 424, 426).

In any event, it is clear that the Board was correct in holding, in consonance with its prior decisions, that the alleged invalidity of the appointment of the administrator (or trustee) had no effect on the local's status as a labor organization or on the rights of any of the parties to this controversy, and that it was not the function of the Board to consider any such question (H.C. App. 31a, fn. 27; *Jat Transportation Corp.*, 128 N. L. R. B. No. 95; *Terminal System, Inc.*, 127 N. L. R. B. 979, 980-1).

Petitioner's primary reliance is on Section 302 of the Labor Management Reporting and Disclosure Act of 1959 (29 U. S. C., Sec. 462), which, petitioner claims, renders invalid a parent union's appointment of a trustee for a local in the absence of authorization therefor in the parent's constitution. Petitioner, however, has overlooked Section 603(b) of the same Act (29 U. S. C., Sec. 523(b)), which provides, so far as here pertinent, that nothing contained in that Act shall "be construed to * * * impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended". The Board has held that that section "in effect provides that the provisions of the Act relied upon shall not be controlling in determining whether the * * * [particular local union] is a qualified labor organization" for the purposes of a proceeding under the National Labor Relations Act (*Jat Transportation Corp., supra*). The Board has further emphasized that it is "not the proper forum" in which to litigate issues arising under the statute here relied upon by petitioner (*Terminal System, Inc., supra*). The Trial Examiner stressed the same considerations in his decision herein (H. C. App. 31a, fn. 27).

Furthermore, petitioner's assumption that the invalidity of Anglin's appointment would necessarily vest it with the status of the original contracting organization, is a

complete *non-sequitur*. If that position were sound, it would mean that a small non-representative faction of a local could secede in the event of the parent union's allegedly invalid appointment of a trustee for the local, and take with it the entire membership and the records, assets and contracts of the local, regardless of the wishes of the majority. As shown above, the Board never intended to reach any such conclusion in this case, and the position urged by petitioner would be in conflict with the applicable decisions of the Board and the courts and with the fundamental policies underlying the National Labor Relations Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROMAN BECK,
Counsel for Respondents, Harbor Carriers of the Port of New York and its Members,
Office & P. O. Address,
27 William Street,
New York 5, N. Y.

ARTHUR KARGER,
JACOB I. GOODSTEIN,
MAURICE A. KRISEL,
CHRISTOPHER E. HECKMAN,
CHARLES J. CARROLL, JR.,
of Counsel.

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APPENDIX A

Additional Statute Involved

Section 603(b) of the Labor Management Reporting and Disclosure Act of 1959 (73 Stat. 540, 29 U. S. C., § 523(b)) reads as follows:

> "§ 603. Retention of rights under other Federal and State laws
>
> . . . .
>
> (b) Nothing contained in titles I, II, III, IV, V, or VI of this Act shall be construed to supersede or impair or otherwise affect the provisions of the Railway Labor Act, as amended, or any of the obligations, rights, benefits, privileges, or immunities of any carrier, employee, organization, representative, or person subject thereto; nor shall anything contained in said titles (except section 505) of this Act be construed to confer any rights, privileges, immunities, or defenses upon employers, or to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended."